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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 200

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the Eastern District of Missouri (R. 6) is not reported. The opinion of the Court of Appeals for the Eighth Circuit (R. 9-17) is reported at 182 F. 2d 149.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 27, 1950

(R. 17-18). A petition for rehearing was denied on May 22, 1950 (R. 33). The petition for a writ of certiorari was filed on July 14, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In 1943, a railroad worker was injured while employed by petitioner on Government property. For those injuries, he recovered damages from petitioner, in 1948, under the Federal Employers Liability Act. The Federal Tort Claims Act authorizes suit against the United States on only those claims accruing on and after January 1, 1945, and the United States has never, therefore, been under any legal liability to pay the railroad worker for his injuries.

The question presented is whether petitioner, in an action against the United States under the Federal Tort Claims Act, may recoup the amount of the damages it paid in 1948 to its employee for his 1943 injuries, where as stated, the United States has never been under any direct legal liability to the employee for those injuries.

STATUTE INVOLVED

28 U.S.C. 1346(b), formerly part of the Federal Tort Claims Act, is set out in the Appendix, *infra*, p. 12.

STATEMENT

Petitioner, under an arrangement with the United States owned-and-operated St. Louis

Ordnance Plant, regularly sent a crew of its switchmen into the Plant for the purpose of switching cars over the various railroad tracks running through the Plant. *Terminal R. Ass'n of St. Louis* v. *Fitzjohn,* 165 F. 2d 473 (C.A. 8).[1] During the night of June 10, 1943, one of petitioner's switchmen, Cornelius W. Fitzjohn, was injured while riding on the side ladder of a freight car in the course of switching cars within the Plant (R. 1, 2).

Fitzjohn brought suit against petitioner in the appropriate district court under the Federal Employers Liability Act, 45 U.S.C. 51 *et seq.* (R. 2). He showed that a vertical iron pipe, on which an electric light was mounted and which was located too close to the edge of the track, had hit him as he was riding by, forcing him off the side of the car and causing him serious injuries (R. 3). The district court ruled that petitioner was negligent in failing to furnish Fitzjohn with a safe place to work. It further found that Fitzjohn, at the time of the accident, was an employee of the petitioner, rather than of the United States, and awarded him a $47,500 judgment against petitioner (R. 2). The Court of Appeals for the Eighth Circuit affirmed the judgment on both grounds (R. 3); *Terminal R. Ass'n of St. Louis* v. *Fitzjohn,* 165 F. 2d 473 (C.A. 8). Thereafter, on

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[1] This case, referred to in petitioner's complaint (R. 3) and in its petition (Pet. 3, 4), discusses the details of this arrangement.

April 2, 1948, petitioner paid Fitzjohn $40,000 in settlement of the judgment (R. 3).

On February 16, 1949, petitioner instituted the instant action in the United States District Court for the Eastern District of Missouri against the United States under the Federal Tort Claims Act, seeking reimbursement for the amount of the settlement and for monies expended by it in defending the Fitzjohn suit (R. 4). The complaint alleged that Fitzjohn's injuries were caused by the negligence of employees of the United States in constructing and placing the light standard too close to the railroad track (R. 2). It further asserted that the alleged act of negligence compelled it to make the $40,000 payment to Fitzjohn as well as additional payments for the legal expenses incurred in defending the Fitzjohn suit. The United States filed a motion to dismiss on the grounds, *inter alia,* that the Federal Tort Claims Act does not cover indemnity actions, and that, in any event, the Act does not cover such an action, where the tort claim on which it is based, accrued prior to January 1, 1945 (R. 4-5).

The motion to dismiss was granted by the district court (R. 6). On appeal the court below pointed out that the Federal Tort Claims Act allows suits on injuries occurring after January 1, 1945 and that the United States therefore was never under any legal obligation to Fitzjohn for his 1943 injuries (R. 13, 14). And, since petitioner, "in satisfying the judgment of Fitzjohn,

discharged no obligation legally owing from the Government to Fitzjohn," the court affirmed the dismissal of petitioner's indemnity action (R. 14, 15). Judge Woodrough dissented (R. 15-17).

ARGUMENT

The only question urged by petitioner as being of general importance is not involved here. Whether the Federal Tort Claims Act (28 U.S.C. 1346(b), *infra*, p. 12) covers indemnity actions and thereby allows suit not only by the "person directly injured" but also by "someone else indirectly damaged by the wrongful act" (Pet. 10) appears to be a question of importance. But that issue is not presented by the instant case. Instead of passing on that point, the court below concluded that the complaint did not state a cause of action in indemnity because the railroad employee's injuries occurred prior to 1945 and the United States could not, therefore, have been directly liable to him for those injuries. Recognizing that the court below did not have to decide whether indemnity actions are covered by the Act, petitioner admits that that court's opinion "is based exclusively on the interpretation that the Act covers only those instances in which the original sufferer from the governmental wrong was injured subsequent to January 1, 1945" (R. 26; see Pet. 4).

That interpretation was the ground on which the court below affirmed the dismissal of the complaint

and raises the sole question now involved in the case. The affirmance, we believe, was plainly correct, and does not warrant further review by this Court.

1. The basis of an indemnity action is the payment by the indemnitee to the injured party of an obligation that should have been discharged by the indemnitor. It is predicated on the primary liability of the indemnitor to the injured party, even though the indemnitee, for some other reason, is secondarily liable to that party. See *Union Stock Yards Co.* v. *Chicago, B. & Q. R. Co.,* 196 U. S. 217, 224-225; *Fidelity and Casualty Co. of New York* v. *Federal Express,* 136 F. 2d 35 (C.A. 6). Discharge of the liability by the indemnitee, the person secondarily liable, leaves him with a right to secure restitution, on the theory of unjust enrichment, from the indemnitor, the person primarily liable. See *Imperial Refining Co.* v. *Kanotex Refining Co.* 29 F. 2d 193, 201 (C.A. 8); *George's Radio* v. *Capital Transit Co.,* 126 F. 2d 219, 222 (C.A.D.C.). In effect, the indemnitor's liability to the indemnitee is "for reimbursement of money paid for and on [the indemnitor's] behalf, which under the law the [indemnitor] was liable for and should have paid." *Appalachian Corp.* v. *Brooklyn Cooperage Co.,* 151 La. 41, 51. "Plain dictates of reason and natural justice" create this implied contract of indemnity in favor of the indemnitee. *Vandiver*

& Co. v. *Pollak,* 107 Ala. 547, 555. Otherwise, the person primarily liable to the injured person would be exculpated from liability at the expense of the person secondarily liable.

Thus, underlying the indemnity action is the existence of a direct and primary liability on the part of the indemnitor to the injured person. In the absence of such a liability, it is obvious that the indemnitee, by making payment to the injured person, is in no way benefitting the indemnitor, or discharging a duty owed by the latter to the injured person, and will not therefore be allowed reimbursement. *Central Surety and Ins. Corp.* v. *Hinton,* 233 Mo. App. 1218; *City of Springfield* v. *Clement,* 296 Mo. 150. The decision in *Fuller Co.* v. *Otis Elevator Co.,* 245 U. S. 489, relied on by petitioner (Pet. 11) is not to the contrary. Indeed, that opinion, fully recognizing that the indemnitee was entitled to reimbursement only because "the primary duty rested on the Elevator Company", the indemnitor, affirmed a jury verdict in favor of the indemnitee on the ground that the indemnitor, having retained control over the elevator operator whose negligence caused the injuries involved, was primarily responsible for his tortious conduct. 245 U. S. 489, 491.[2]

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[2] Nor do any of the lower court cases cited by petitioner support its position. Thus, *Green* v. *War Shipping Admin.,* 66 F. Supp. 393 (E.D.N.Y.); *Benevento* v. *United States,* 68 F. Supp. 347 (S.D.N.Y.), affirmed on other grounds, 160 F. 2d 487 (C.A. 2); and *Severn* v. *United States,* 69 F. Supp. 21 (S.D. N.Y.), were cases where the United States impleaded the employer of the libellant, relying on an *express* contract of

There can be no doubt that the United States never could have been held liable to Fitzjohn for his 1943 injuries. The Federal Tort Claims Act, as originally written, allowed suit on only those tort claims "accruing on and after January 1, 1945" (Section 410(a), 60 Stat. 843-844). When amended by the Act of April 25, 1949, the identical limitation to claims "accruing on and after January 1, 1945" was reincorporated into the Act (Section 2(a) of Public Law 55, 81st Cong., 1st sess., amending 28 U.S.C. 1346(b)). Since the United States never consented to suit on torts occurring prior to 1945, it is obvious that petitioner's employee himself never had any cause of action against the Government. See *Perry* v. *United States,* 170 F. 2d 844 (C.A. 6); *Oahu Ry. & Land Co.* v. *United States,* 73 F. Supp. 707 (D. Hawaii). Consequently, as observed by the court below (R. 14), petitioner, in paying its employee for his 1943 injuries, did not discharge any obligation owed to the employee by the United States and so has no valid claim for indemnity against the United States.

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indemnity, not on any unjust enrichment of the indemnitor which would furnish the basis for the type of quasi-contractual action of indemnity petitioner sought to bring here. Similarly, in *Westchester Lighting Co.* v. *Small Estates Corp.,* 287 N.Y. 175, the court pointed out that the suit there was for the "breach of an alleged *independent* duty or obligation owed" [italics supplied] to the indemnitee by the indemnitor. 278 N.Y. 175, 179. *Barbara* v. *Ransom,* 79 N.Y. Supp. 2d 438, simply relies on the *Westchester* case, and goes no further.

2. Nor is there any merit to petitioner's contention that a different result is required by *United States* v. *Aetna Surety Co.*, 338 U. S. 366. Seizing on a portion of a sentence in the *Aetna* case to the effect that there "the injured person failed to commence any action against the United States within one year after the accident" (Pet. 11), petitioner points to the Federal Tort Claims Act's former one year limitation period (Section 420, 60 Stat. 845),[3] concludes that the injured person therefore "never had a live right of action against the United States" (Pet. 11), and argues that since this Court nevertheless recognized Aetna's right of action against the United States, similar recognition should be accorded the instant indemnity claim against the United States even though petitioner's employee never had an action against the United States for his injuries. Apart from the inherent differences between a subrogation claim (involved in the *Aetna* case) and an indemnity claim, which make the rationale of the *Aetna* opinion wholly inapplicable here,[4] petitioner's argument ignores the fact that the injury

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[3] The limitation period is now two years. 28 U.S.C. 2401(b), as amended by Section 1 of Public Law 55, 81st Cong., 1st Sess., April 25, 1949.

[4] A subrogee, of course, stands in the shoes of the injured person, and in asserting his action *ex delicto* against the tortfeasor, is subject to the same defenses the tortfeasor could have asserted against the injured person. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 242. The indemnitee, on the other hand, seeks reimbursement against the tortfeasor on quasi-contractual grounds. *Supra*, pp. 6-7.

in the *Aetna* case occurred on February 8, 1945,[5] and that under the Act, which took effect on August 2, 1946, the injured person could have brought suit "within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later" Section 420, 60 Stat. 845. Thus, the injured person in that case had until August 2, 1947 to bring suit. Actually, as was pointed out to petitioner in the brief we filed below, Aetna brought that suit against the United States on May 28, 1947, several months before the statutory period would have expired as against the injured person and therefore as against Aetna as well.[6] Accordingly, petitioner's reliance on the *Aetna* case is, we submit, altogether misplaced.

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[5] *Aetna Casualty & Surety Co.* v. *United States*, 170 F. 2d 469, 470 (C.A. 2).

[6] In this connection, it should also be noted that the statement in the *Aetna* case with respect to the failure to institute suit within one year after the accident had reference, not as petitioner intimates, to any statutory period of limitations in the Federal Tort Claims Act, but only, as the full sentence in which the statement appears makes clear, to the New York statutory provision requiring assignment of the claim to the insurance carrier where the injured person fails to commence action against the tortfeasor within one year after the claim accrued. 338 U. S. 366, 368.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

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AUGUST, 1950.

APPENDIX

28 U.S.C. 1346(b), as amended by Section 2(a) of Public Law 55, 81st Cong., 1st Sess., April 25, 1949, provides:

§ 1346. United States as defendant.

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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